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## FAMILY REUNIFICATION OF EUROPEAN COMMUNITY NATIONALS

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*Summary: The right to free movement of EC nationals encompasses their right to be joined by family members and the right of these family members to be integrated into the host Member State by being granted certain rights, such as the right to obtain employment. This paper discusses the nature, beneficiaries, legal bases and scope of the right to family reunification. The discussion offers a detailed analysis of current developments in this area, and provides answers to a number of issues raised by existing Community legislation and case law. Recent trends promulgated by the ECJ's case law show signs of a changing approach towards family reunification, leading to an acknowledgement of the right to family life as the legal basis for family reunification in cases where movement has occurred, but cannot be used as a basis for applying Community law.*

### 1. Introduction

The right to free movement of EC nationals encompasses their right to be joined by family members and the right of these family members to be integrated into the host Member State by being granted certain rights, such as the right to obtain employment. As such, it is obvious that an EC worker's right to family reunification is based on the perception of a worker as a human being exercising his/her social rights when moving to another Member State and taking up employment there. Thus, the right to family reunification departs from the image of an EC worker as a solely economic unit of production, instead being founded on the free movement of persons as a realisation of one's personal rights and on the promotion of European integration<sup>1</sup>.

The right to free movement has been conferred to the fullest degree on all EC nationals, with the Community being particularly keen to promote integration and the functioning of the internal market by stimulating its citizens to move freely from one Member State to another. Without conferring rights on EC nationals to bring their closest family members with them when migrating, and without conferring certain rights on those family members themselves, there would be little movement of EC nationals, since the incentive to migrate would be lacking.<sup>2</sup> This fact has been acknowledged in Community secondary legislation dealing with the rights of family members of EC nationals.<sup>3</sup>

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<sup>1</sup> The Preamble to the EC Treaty refers to "an ever closer union among the peoples of Europe".

<sup>2</sup> Barrett, *Family Matters: European Community Law and Third-Country Family Members* (2003) 40 CMLRev. p. 376.

<sup>3</sup> E.g. the preamble to Council Reg. 1612/68 [1968] OJ L 257/02 on freedom of movement for workers within the Community, which states: "the right to free movement...requires...that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country". Also, the preambles to Council Dir. 90/365 [1990] OJ L 180/28 on the right of residence for employees and self-employed persons who have ceased their occupational activity and to Council Dir. 90/364 [1990] OJ L 180/26 on the right of residence state: "this right (*meaning the right of residence- author's comment*) can only be genuinely exercised if it is also granted to members of the family".

Additionally, as analysed further below, recent trends promulgated by the ECJ's case-law show signs of a changing approach towards family reunification, with free movement no longer being cited as the only legal basis for granting family reunification rights. Instead, there has been a shift of emphasis, moving beyond the premise that family reunification is a manifestation of the social facet of the free movement principle towards full recognition of the family life of EC nationals as a human right,<sup>4</sup> and consequently leading to acknowledgement of the right to family life as a legal basis for family reunification in cases where movement has occurred but cannot be used as a basis for applying Community law.<sup>5</sup> The deepening significance of human rights as the legal basis for family reunification is compatible with a shift of emphasis in the area of the free movement of persons in general, namely, the perception of their rights as not only economic but also civil and social.

Before moving on to the analysis, an important distinction between two situations must be made. The right to family reunification can be viewed from the perspective of those from whose status it derives (hereinafter "primary beneficiaries"), or of family members who acquire these rights due to their relation to the primary beneficiary (hereinafter "secondary beneficiaries"). This paper will discuss the position of both primary and secondary beneficiaries, analysing the nature, beneficiaries, legal bases and spectrum of rights granted. The analysis will mostly deal with EC national workers, as the most prominent category of primary beneficiaries, but other categories of EC nationals eligible for family reunification will also be taken into consideration. The focus will be on the rights of secondary beneficiaries, while the rights of primary beneficiaries will be viewed primarily in the context of examining Community policy's reasoning and the rationale behind granting rights to family members. The intention of the legislation will sometimes be juxtaposed with recent reasoning and judgements by the European Court of Justice, especially in cases of a "wholly internal situation" that could lead to reverse discrimination.

## 2. Nature of Rights

The rights of family members of EC nationals are derivative in nature. Their existence depends on a family relation to an EC national and on the primary beneficiary's exercise of the right to move/migrate from one Member State to another.<sup>6</sup> The general rule requires the presence of both conditions for the exercise of family members' rights, having as its consequence the loss of these rights should either condition be non-existent or lost.<sup>7</sup> However, as analysed further below, neither condition is absolute; rather, there are flexible solutions in cases that do not necessarily fulfil one of the two requirements. The analysis will show that both the family relation condition and the

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<sup>4</sup> Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279; Case C-257/00, *Nani Givane and Others v. Secretary of State for the Home Department* [2003] ECR I-00345; Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. État belge* [2002] ECR I-6591.

<sup>5</sup> Case C-109/01, *Secretary of State for the Home Department v. Hacene Akrich* [2001] ECR I-9607

<sup>6</sup> Additionally, Article 10 of Regulation 1612/68 (n.3), providing for the right of family members of EC workers to install themselves with the worker, imposes a third requirement on the primary beneficiary, stipulating that he must make available to his family "housing considered normal for national workers in the region where he is employed".

<sup>7</sup> Cremona, *Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union*, (1995) 2 Legal Issues of European Integration, p. 93.

movement/migration condition may sometimes not be (fully) satisfied, and yet family members' rights will nonetheless be protected by the Community. Such cases question the derivative nature of family members' rights, and point the way to possible future developments in this area.

## **2.1. Family Relation as the First Condition**

A family relation between the primary and secondary beneficiary is the first and most obvious condition required for family reunification rights to come into play. The type of family relation required, i.e. the categories of a primary beneficiary's relatives encompassed by EC secondary legislation, will be identified below in the chapter on beneficiaries. Chapter 2.1. will deal only with cases that relativise the family relation condition, showing that the break-up or termination of a family bond need not always lead to the loss of rights arising from family reunification. This statement will be illustrated by two examples. The first case is the separation or even divorce of the primary and secondary beneficiary, which does not preclude the continued existence of family members' rights. This situation will be demonstrated by analysis of the following cases: *Diatta*,<sup>8</sup> *Singh*,<sup>9</sup> and *Baumbast and R*.<sup>10</sup> The second case is the death of the primary beneficiary, which, again, does not affect the secondary beneficiary's right to remain in the territory of the host Member State. This statement will be demonstrated by analysis of Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, and supported by the Court's position in *Nani Givane*<sup>11</sup>.

### **a) Separation/Divorce of the Primary and Secondary Beneficiary**

The case of separation or divorce of the primary and secondary beneficiary, which does not preclude the right to family reunification, will be illustrated by three cases: *Diatta*,<sup>12</sup> *Singh*,<sup>13</sup> and *Baumbast and R*.<sup>14</sup> *Diatta*<sup>15</sup> and *Baumbast and R*<sup>16</sup> rely on Regulation 1612/68/EEC on freedom of movement for workers within the Community as its legal basis, while *Singh*<sup>17</sup> relies on Articles 39 and 43 of the EC Treaty and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. These cases set limits on the derivative nature of the rights of EC nationals' family members. *Diatta*<sup>18</sup> and *Singh*<sup>19</sup> question the prevailing approach dominated by the primary beneficiary, which regards the rights of the secondary

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<sup>8</sup> Case 267/83, *Diatta v. Land Berlin* [1985] ECR 567.

<sup>9</sup> Case C-370/90, *R. v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265.

<sup>10</sup> Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I-07091.

<sup>11</sup> Case C-257/00, *Nani Givane and Others v Secretary of State for the Home Department* [2003] ECR I-00345.

<sup>12</sup> 267/83 *Diatta v. Land Berlin* [1985] ECR 567.

<sup>13</sup> *Singh*, see n.9

<sup>14</sup> *Baumbast and R*, see n.10

<sup>15</sup> *Diatta* see n.8

<sup>16</sup> *Baumbast and R* see n.10

<sup>17</sup> *Singh* see n.9

<sup>18</sup> *Diatta* see n.8

<sup>19</sup> *Singh* see n. 9

beneficiary as a mere by-product of the primary beneficiary's right to family life. They best illustrate a case in which the secondary beneficiary's rights are preserved despite separation, though not yet divorce, from the primary beneficiary. On the other hand, the third case, *Baumbast and R*,<sup>20</sup> shows that the right to family reunification can continue to exist despite the absolute termination of a marital relation by divorce.

The first two cases, *Diatta*<sup>21</sup> and *Singh*,<sup>22</sup> show that rights arising from family reunification can be exercised even if the spouses do not live together or are separated, as long as their marriage has not been officially terminated by the competent authority, i.e. as long as there has not been an official dissolution of the family bond.<sup>23</sup> In both cases the primary and secondary beneficiary were separated but not (yet) officially divorced. Ms. Diatta was married to a French national. Both were resident and working in Berlin. After some time, she separated from her husband with the intention of divorcing him and started living in separate accommodation. Both spouses remained in Germany. The Court stated that the fact that the spouses were no longer living together (even though still officially married) did not preclude the secondary beneficiary's right of residence and employment in the Member State where the primary beneficiary resided, based on Articles 10 and 11 of the Council Regulation on freedom of movement for workers within the Community.<sup>24</sup> The Court reasoned that "in providing that a member of a migrant worker's family has the right to install himself with the worker, Article 10 of the Regulation does not require that the member of the family in question must live permanently with the worker but, as is clear from Article 10(3),<sup>25</sup> only that the accommodation which the worker has available must be such as may be considered normal for the purpose of accommodating his family".<sup>26</sup> It stressed that "a requirement that the family must live under the same roof permanently cannot be implied".<sup>27</sup> The Court further elaborated that "such an interpretation corresponds to the spirit of Article 11 of the Regulation which gives the member of the family the right to take up any activity as an employed person *throughout* the territory of the Member State concerned, even though that activity is exercised at a place some distance from the place where the migrant worker resides" (emphasis added).<sup>28</sup> It concluded that "the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority", clarifying that "it is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date".<sup>29</sup>

In *Diatta*<sup>30</sup> the Court seemed to follow the arguments provided by the plaintiff, stating that "it is not for the immigration authorities to decide whether a reconciliation is still

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<sup>20</sup> *Baumbast and R* see n.10

<sup>21</sup> *Diatta* see n. 8

<sup>22</sup> *Singh* see n.9

<sup>23</sup> However, rights arising from family reunification do not apply to couples living together but not officially married (see Case 59/85 *Netherlands v. Reed* [1986] ECR 1283).

<sup>24</sup> Regulation 1612/68 (n.3)

<sup>25</sup> Article 10(3) of Regulation 1612/68 (n.3): "For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from the other Member States."

<sup>26</sup> *Diatta* (n.8) para.18

<sup>27</sup> *Diatta* (n.8) para.18

<sup>28</sup> *Diatta* (n.8) para. 19

<sup>29</sup> *Diatta* (n.8) para.20

<sup>30</sup> *Diatta* n.8

possible”.<sup>31</sup> If the family bond has not been broken, the conditions for family reunification still exist, and it can, therefore, still be argued that granting the right of residence to the secondary beneficiary merely has the function of protecting the primary beneficiary’s right to free movement and family life. On the other hand, Craig and de Burca rightly argue that “the Court was probably influenced by the argument made on behalf of Ms. Diatta that, if cohabitation was mandatory, a worker could at any moment cause the expulsion of a spouse by depriving that spouse of a roof”.<sup>32</sup> In this respect, it could be maintained that the Court took into consideration the position of a non-Community national, i.e. the secondary beneficiary, who was separated but not yet divorced from the primary beneficiary, and who would otherwise have been left “at the mercy” of the primary beneficiary’s intention of keeping his spouse under the same roof. However, the Court’s arguments suggested that once the divorce proceedings were finalised, Ms. Diatta could no longer derive rights from Regulation 1612/68, and would thus face possible expulsion from the host Member State. One can, therefore, conclude that the Court would not be willing to consider Ms. Diatta’s rights separate from her husband’s rights to family reunification. The Court viewed Ms. Diatta’s interests only within the framework of family reunification, as a derivation of her spouse’s rights.

Regarding this line of thought, Weiler argues that the Court made a crucial mistake by not considering at all whether an interpretation of Article 11 of Regulation 1612/68 giving the primary beneficiary such power over the secondary beneficiary’s life, i.e. by divorce or threat of divorce leading to possible expulsion from the host Member State, represents a violation of the secondary beneficiary’s human rights, as was pleaded by both Ms. Diatta and the Commission (albeit only in the oral hearing).<sup>33</sup> He notes that, even though Regulation 1612/68 states that a spouse loses the right of residence once a divorce is final, in the event of an alleged violation of fundamental human rights the Court must investigate whether the relevant provision is in conflict with the human rights norm.<sup>34</sup> Should its findings be positive, the Court has “either to construe the Community measure in such a way that it does not conflict with human rights norms... or to strike the Community measure down”.<sup>35</sup> Weiler finds it acceptable that Ms. Diatta (or any other non-Community spouse of an EC national) would lose her derivative rights by divorce, but adds that having her lose protection of her fundamental human rights would make her “an instrumentality, a means to ensure the economic goal of free movement of all factors of production”.<sup>36</sup> Read in this light, his arguments seem utterly convincing, and the path taken by the Court rather dangerous, if not incorrect. However, one must remember that the Court reached its decision in *Diatta*<sup>37</sup> two decades ago. Since then, its rulings have shown a willingness to take a more liberal approach and consider the changing and widening objectives of the original Treaty of Rome and the

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<sup>31</sup> *Diatta* (n.8) para.10

<sup>32</sup> Craig and de Burca, *EU LAW – TEXT, CASES AND MATERIALS*, Oxford University Press, 2003, p. 742.

<sup>33</sup> Weiler, *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique* (1992) 3 EJIL p. 87.

<sup>34</sup> Weiler (ibid., p. 88) provides two examples which would classify Ms. Diatta’s case as a violation of human rights. First, a situation in which a Community measure would empower the primary beneficiary to force his/her spouse to act under the threat of divorce and consequent expulsion could compromise the spouse’s right to human dignity. Second, a case in which the primary beneficiary gained custody over children, while the spouse’s relationship with the children was terminated via expulsion, could compromise the spouse’s right to family life.

<sup>35</sup> Weiler, ibid., p. 87.

<sup>36</sup> Weiler, ibid., p. 90.

<sup>37</sup> *Diatta*, n.8

extension of the primary ideology of market freedoms to include the principle of fundamental human rights. Recent decisions taken by the Court in *Carpenter*<sup>38</sup> and, in particular, *Akrich*<sup>39</sup>, as analysed below, suggest that the ECJ has changed its approach drastically in recent family reunification cases, to the benefit of the protection of fundamental human rights, by shifting the emphasis from free movement to human rights issues.

In *Surrinder Singh*,<sup>40</sup> Mr. Singh, an Indian national, was married to a British national. They travelled together to Germany, where both of them worked for several years before returning to the UK in order to set up a business. Upon their return to the UK, Mr. Singh was granted a limited right of residence there, which was terminated by the immigration authorities after Ms. Singh started divorce proceedings against her husband. In this case the Court went even further, granting the non-Community spouse of a UK national the right of residence arising from a family relation, despite the *decree nisi* of divorce pronounced against him in the divorce proceedings. The fact that the marriage was later dissolved by a decree absolute of divorce was, according to the Court, “not relevant to the question referred for a preliminary ruling which concerns the basis of the right of residence of the person concerned during the period before the date of that decree”.<sup>41</sup>

The marital situation in *Singh*<sup>42</sup> left the Court with less room to follow the narrow interpretation it formed in *Diatta*<sup>43</sup> and justify the existence of the secondary beneficiary’s right of residence only for the purpose of protecting the primary beneficiary’s right to free movement and family life. Here there was no doubt as to the endurance of the family relation in the future, since the marriage had actually been dissolved at a date prior to the Court’s judgement. The possibility of later reconciliation of separated but not yet divorced spouses could not be used as an argument in protecting the primary beneficiary’s right to free movement. Still, the judgement in *Singh* is concerned only with the period prior to the official date of divorce, i.e. before the *decree absolute*. The judgement preserves the primary beneficiary’s right to family life, as one of the conditions for the fulfilment of her right to free movement, but pertains only to the period before divorce. It can be argued that a family relation must exist at a point in time when a right to family reunification was disputed by one of the parties. It is not necessary that the family relation still exist at the time of the judgement.

The above cases illustrate the endurance of rights arising from a family relation despite the spouses’ separation. On the other hand, the third case, *Baumbast and R*,<sup>44</sup> demonstrates that these rights can continue to exist despite the absolute termination of a marital relation by divorce. In this case, the Court cited a different legal basis for granting a Community migrant worker’s former spouse right of residence in the host Member State following their divorce. R was a non-EC national who had two children by her former husband, who was a French national working and residing in the United Kingdom. After several years of living together in the UK, R and her husband divorced.

<sup>38</sup> Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279.

<sup>39</sup> *Akrich*, n.5

<sup>40</sup> *Singh*, n.9

<sup>41</sup> *Ibid.*, para.12

<sup>42</sup> *Singh*, n.9

<sup>43</sup> *Diatta*, n.8

<sup>44</sup> *Baumbast and R*, n.10

No measures affecting her status were taken by the UK authorities at that time. The divorce settlement provided that the children were to reside with R in England and Wales for at least five years, or such other time as agreed by the parties. They had regular contact with their father. When R and the children, under domestic law, applied for indefinite leave to remain in the UK, the UK authorities accepted the children's application, but refused R's. When the case came before the European Court of Justice through a preliminary ruling procedure, the Court decided that R's right of residence in the UK stemmed from Article 12 of Regulation 1612/68 on freedom of movement for workers within the Community, which provides right of access to educational courses to the children of a national of one Member State who is or has been employed in another Member State.<sup>45</sup> In resolving the issue of R's right of residence in the UK following her divorce from a Community migrant worker, the Court concluded that "where children have the right to reside in a host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right *notwithstanding the fact that the parents have meanwhile divorced* or that the parent who has the status of citizen of the European Union has ceased to be a migrant worker in the host Member State" (emphasis added).<sup>46</sup>

The Court's reasoning in *Baumbast and R*<sup>47</sup> is significantly different from that in *Diatta*<sup>48</sup> and *Singh*.<sup>49</sup> With regard to this case, possible deviations from the derivative nature of a family member's rights must be viewed from a different angle. First, the primary and secondary beneficiary were already divorced at the relevant point in time. The family relation condition was therefore terminated, and the secondary beneficiary faced the possibility of losing her right of residence in the host Member State, based on Regulation 1612/68. Her right could no longer be protected as a component of the primary beneficiary's right to free movement. Here, the right of another group of secondary beneficiaries – the children of the primary and secondary beneficiary – came into play, and had a crucial role in preserving the rights of the primary beneficiary's former spouse. Her right of residence no longer derived from the primary beneficiary, but rather from their children's right to education, which itself derived from the primary beneficiary's right to free movement. The rights of the former spouse were still derivative in nature, and could be viewed as the third link in a chain consisting of the primary beneficiary and two groups of secondary beneficiaries. However, the direct link between the former spouse and the primary beneficiary had been broken, and the legal basis for her rights was different. In that respect, the rights of the former spouse served to permit the exercise of the right to education of another group of secondary beneficiaries. Even though the indirect effect of the judgement was the preservation of the secondary beneficiary's family life, it seems that the Court, similar to its *Diatta*<sup>50</sup> judgement, did not take into consideration the fundamental human rights of the

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<sup>45</sup> Article 12 of Regulation 1612/68 (n.3) states: "The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions."

<sup>46</sup> *Baumbast and R*, (n.10), para. 75

<sup>47</sup> *Baumbast and R*, n.10

<sup>48</sup> *Diatta*, n.8

<sup>49</sup> *Singh*, n.9

<sup>50</sup> *Diatta*, n.8

secondary beneficiary, i.e. her right to family life. Even though R submitted that a refusal to afford her the right of residence would be “a disproportionate interference with family life, contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,”<sup>51</sup> the Court did not consider this argument, basing its judgement entirely on the children’s right to education, and only indirectly conferring the right of residence on their mother, as a derivation of their right to education. In this respect, the Court’s reasoning was again in conflict with the suggestions made by Weiler with regard to *Diatta*.<sup>52</sup>

## **b) Primary Beneficiary’s Death**

The second example of the flexibility of the family relation condition is provided by the case of the primary beneficiary’s death, which does not preclude the secondary beneficiary’s right to remain in the territory of the host Member State. Here, the right of the spouse of a primary beneficiary to reside in the host Member State arises from their family bond, i.e. family reunification, while the death of the primary beneficiary transforms the spouse’s derivative right into a right of his/her own. The legal basis here is different from the cases of separation/divorce between spouses analysed in the section above; namely, Regulation 1251/70/EEC on the right of workers to remain in the territory of a Member State after having been employed in that State. According to Article 3 of Regulation 1251/70/EEC, the family members of a national of a Member State who has worked as an employed person in the territory of another Member State, having resided with him in the territory of the host Member State, are entitled to remain there permanently even after his death if the worker himself acquired the right to remain there, as specified in the Regulation.<sup>53</sup> Should a worker die before having acquired the right to remain in the territory of the host Member State, his family members are entitled to remain there if the conditions prescribed by the Regulation have been fulfilled.<sup>54</sup>

In this situation, if the family member is the spouse of the primary beneficiary,<sup>55</sup> the right to remain in the territory of a Member State persists despite the actual *termination* of the family bond, i.e. of marriage between the primary and secondary beneficiary. As

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<sup>51</sup> *Baumbast and R*, (n.10), para. 65

<sup>52</sup> *Diatta*, n.8

<sup>53</sup> According to Article 2 of Commission Reg. 1251/70 [1970] OJ L 142/24, the primary beneficiary is entitled to remain permanently in the territory of another Member State if one of the following conditions is fulfilled: 1) he/she is entitled to an old-age pension and has been employed in that Member State for at least the last twelve months, and has resided there continuously for more than three years; or 2) he/she, having resided continuously in the territory of that Member State for more than two years, ceases to work there as a result of a permanent incapacity to work; or 3) he/she, after three years’ continuous employment and residence in the territory of that Member State, works as an employed person in the territory of another Member State, while retaining his/her residence in the territory of the first Member State to which he/she returns each day or at least once a week.

<sup>54</sup> The conditions set by Article 3(2) of Regulation 1251/70 (n.53) are that “the worker on the date of his decease had resided continuously in the territory of that Member State for at least 2 years; or his death resulted from an accident at work or an occupational disease; or the surviving spouse is a national of the State of residence or lost the nationality of that State by marriage to that worker.”

<sup>55</sup> According to Article 3 of Regulation 1251/70 (n.53), family members entitled to the right of residence after the primary beneficiary’s death include: the spouse, descendants of the primary beneficiary and his/her spouse under the age of 21 or dependants, and dependant relatives in an ascending line from the primary beneficiary and his/her spouse.



the European Court of Justice has rightly stated in *Nani Givane*, “the worker’s death transforms his family members’ right of residence into a right of their own”.<sup>56</sup> Upon the primary beneficiary’s death, the nature of the spouse’s right changes from a derivative one into one attributed directly to him/her. By recognising the right of residence of a deceased worker’s family member, the Community has opted for protection of the secondary beneficiary independently, despite the fact that the primary beneficiary has ceased to exist; however, only on the conditions<sup>57</sup> set forth in Regulation 1271/70/EEC, where the element of the *continuity* of a primary beneficiary’s employment and residence prevails. As the Court held in *Nani Givane*,<sup>58</sup> such conditions serve to establish a “*significant connection*” (emphasis added) between that Member State and the worker and his family, and “to ensure a certain level of their *integration* in the society of that State” (emphasis added).<sup>59</sup>

Protection of the right of residence of family members of deceased EC nationals results from a broader Community policy reasoning in the area of the free movement of EC workers, as mentioned previously. First, the freedom of movement of EC workers, according to Article 39(3)(d) of the EC Treaty, entails the right “to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations”. Regulation 1251/70/EEC ensures that the right provided by Article 39(3)(d) of the EC Treaty is granted under the conditions specified within it. Second, the preamble of Regulation 1251/70/EEC proclaims that “the exercise by the worker of the right to remain entails that such right shall be extended to members of his family”, and continues by adding that “in the case of the death of the worker during his working life, maintenance of the right of residence of the members of his family must also be recognised and be the subject of special conditions”. The reasoning supporting extension of an EC worker’s right to remain to his/her family members is that EC workers’ freedom of movement cannot be exercised unless it is also granted to their family members. This has been recognised by both Community legislation<sup>60</sup> and the European Court of Justice’s case-law.<sup>61</sup> However, the fact that the right to remain also applies to family members of *deceased* EC workers is more than just an embodiment of the free movement principle. It ensures the protection of the family life of Member States’ nationals *per se*, and shields the interests of the worker and his/her family members.

To conclude, the preceding sections distinguish between two situations. The first is the case of separation/divorce of the primary and secondary beneficiary. The second is the case of the death of the primary beneficiary. Both situations show the relative nature of the family relation condition generally required for family reunification to come into effect. These two situations demonstrate that the break-up or termination of a family relation need not always preclude the granting of rights arising from family

<sup>56</sup> Paragraph 31 of case C-257/00, *Nani Givane and Others v Secretary of State for the Home Department* [2003] ECR I-00345.

<sup>57</sup> For the list of conditions, see n. 54.

<sup>58</sup> Case C-257/00 *Nani Givane and Others v Secretary of State for the Home Department* [2003] ECR I-00345.

<sup>59</sup> *Ibid.* para. 45

<sup>60</sup> E.g. the preamble to the Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity (90/365/EEC) and the preamble to the Directive on the right of residence (90/364/EEC), stating that the right of residence “can only be genuinely exercised if it is also granted to the members of the family”.

<sup>61</sup> *Diatta* (n.8) para.13; *Singh* (n.9) para.19,20; *Nani Givane* (n.58) para.45

reunification. In the first situation, i.e. separation/divorce, the secondary beneficiary's rights are interpreted as broadly as possible, but only within the framework of the primary beneficiary's rights. In *Diatta*,<sup>62</sup> *Singh*<sup>63</sup> and *Baumbast and R*,<sup>64</sup> the cases analysed within the first situation, the Court never questioned the derivative nature of secondary beneficiary's rights, and never actually went beyond the wording of the relevant provisions. One could maintain, with considerable certainty, that the Court would not have granted rights arising from family reunification had Ms. Diatta or Mr. Singh already been officially divorced from their Community national spouses at the relevant time, or if R. had had no children by her former husband to take care of as their primary carer. The second situation, i.e. the death of the primary beneficiary, goes much further in proving the relativity of the family relation condition, and boldly transforms the secondary beneficiary's rights from derivative into independent ones. In this situation, the secondary beneficiary's rights are no longer perceived as a mere by-product of the primary beneficiary's right to free movement, but are, significantly, approached as independent rights of the secondary beneficiary. Such a distinction between these two situations is understandable, considering the fact that the latter is regulated by Community secondary legislation, thus leaving the Court in a position of not having to tread new ground and play a partisan role in extending the rights of secondary beneficiaries. In contrast, separation/divorce cases require the Court to play exactly this role, reading Community provisions in a flexible manner if more rights than are stipulated are to be granted.

## **2.2. Cross-Border Movement/Migration of the Primary Beneficiary as the Second Condition**

The second condition for the existence of the rights of family members is the primary beneficiary's exercise of the right to move/migrate from one Member State to another. Unlike the first condition, this one is not self-evident, and requires an explanation that would either support or dispute its justification. This chapter will try to identify the legal foundations and reasoning behind this rule, at the same time illustrating the practical implications of the cross-border movement condition by means of a number of cases, which will be analysed in the order of their appearance and finalisation before the European Court of Justice. It will determine the scope of the cross-border movement condition by looking at cases that have triggered the application of Community law, as well as those that were judged to fall outside its reach. The historical development and the ECJ's evolving attitudes as to what constitutes a wholly internal situation will be discussed, with a special emphasis on reverse discrimination, its causes, and possible ways of resolving it.

This chapter will illustrate the growing importance of human rights in family reunification cases, which has evolved parallel to a general shift of emphasis in the area of the free movement of persons, from its perception as an economic to a civil and social right. The case analysis will show that the initial perception of family reunification as an expression of the social dimension of the free movement principle has subsequently evolved: first, towards the full recognition of the family life of EC

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<sup>62</sup> *Diatta*, n.8

<sup>63</sup> *Singh*, n.9

<sup>64</sup> *Baumbast and R*, n.10

nationals as a human right,<sup>65</sup> and, later, towards an acknowledgement of family life as the legal basis for family reunification in cases where cross-border movement has taken place but cannot be used for the application of Community law.<sup>66</sup> Recent European Court of Justice case-law questions the future development of the cross-border movement condition, which seems to be slowly becoming redundant and outdated as the European integration process moves on.

The ECJ first ruled out the application of family reunification rights in a situation lacking cross-border movement in the early case *Morson and Jhanjan*.<sup>67</sup> Here, the Court held that the non-Community (Surinamese) parents of two Dutch nationals working and residing in the Netherlands were not entitled to stay in the country with their children and enjoy the benefits of Article 10 of Regulation 1612/68/EEC. The Court supported its decision by stating that the Dutch nationals had not exercised their right to free movement, since they were both residing and working in the Netherlands.<sup>68</sup> Since there was no cross-border movement, the situation lacked any factor connecting it to Community law,<sup>69</sup> and was classified as a wholly internal situation. This reasoning was confirmed in the subsequent joint cases *Uecker and Jacquet*.<sup>70</sup> These cases concerned two third-country nationals who tried to make use of Community law as the spouses of German nationals residing and working in Germany: Ms. Uecker was Norwegian and Ms. Jacquet was Russian. Both of them came to Germany to live with their husbands, neither of whom had worked outside Germany at the material time. Both wives were employed at German universities, but obtained only short-term contracts with their employers. They sought to rely on Articles 7 and 11 of Regulation 1612/68/EEC, claiming equal treatment with German nationals in employment. The ECJ again ruled that Community law could not be applied to the situation of Ms. Uecker and Ms. Jacquet, since the right to free movement had not been exercised. The Court continued by stating that “citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law”.<sup>71</sup> This statement explicitly excludes any possibility of a different interpretation of wholly internal situations in view of the creation of EU citizenship by the Treaty of Maastricht.

These two cases illustrate several points. First, neither in 1982 nor in 1997 was the European Court of Justice willing to interfere in situations that were regarded as purely or wholly internal.<sup>72</sup> As Tillotson and Foster noted, it could be even argued that the

<sup>65</sup> *Carpenter* n.38; *Nani Givane* n.11; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. État belge* [2002] ECR I-6591.

<sup>66</sup> *Akrich* n.5

<sup>67</sup> Cases 35 & 36/82, *Morson and Jhanjan v. Netherlands* [1982] ECR 3723.

<sup>68</sup> *Ibid.*, para.17

<sup>69</sup> *Ibid.*, para.16

<sup>70</sup> Cases C-64 & 65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet* [1997] ECR I-3171.

<sup>71</sup> *Ibid.*, para.23

<sup>72</sup> Maduro (see Maduro, *WE THE COURT*, Hart Publishing, 1998, p. 154) defines a purely internal situation as one “not falling within the scope of Community law”, and states that the connection of a particular fact with the Community’s legal order can be ascertained based on two main criteria: the degree of legal integration, and the existence of a link with another Member State or the exercise of free movement. Cannizzaro (Cannizzaro, *PRODUCING ‘REVERSE DISCRIMINATION’ THROUGH THE EXERCISE OF EC COMPETENCES*, YEL, 1997, p. 32) defines a purely internal situation as one “governed by national law falling outside the field of application of EC law”, explaining that this term “is meant to imply unrestricted freedom of Member States to regulate at their pleasure situations of no relevance to the realization of the objectives of the Community”.

Court should refuse to accept references from national courts when dealing with internal situations, since a reference under Article 234 can only be made when Community law applies.<sup>73</sup> Second, had the EC-national children in *Morson and Jhanjan* or the husbands in *Uecker and Jacquet* been migrant workers, they would have been entitled to the protection afforded by Regulation 1612/68/EEC, and their family members would have been granted rights thereunder. Thus, a wholly internal situation leads to reverse discrimination, where citizens of a host Member State cannot enjoy the more favourable treatment afforded by Community law in situations where EC nationals have exercised cross-border movement. Or, to put it the other way round, reverse discrimination is possible only in purely internal situations, while in situations regulated by Community law, reverse discrimination would be prohibited by the ECJ.<sup>74</sup> Although conscious of the negative effects of reverse discrimination, the Court has refused to intervene in wholly internal situations, and has thus created anomalies. Some authors have offered different explanations of the ECJ's motivation for non-intervention in cases of reverse discrimination. Nic Shuibhne notes that this has been conceived as an "unusual but inevitable and acceptable corollary of non-interference by the Community in the internal affairs of the Member States".<sup>75</sup> Similarly, Weatherill and Beaumont suggest that the ECJ sought to avoid undue interference in the internal affairs of a Member State, adding that "the problem of reverse discrimination is unlikely to be serious, since a state has little incentive to discriminate against its own nationals".<sup>76</sup> However, they all agree that the reasoning behind the purely internal situation ceases to make sense as the process of European integration proceeds, a point that will be discussed further below. Thirdly, as Cremona,<sup>77</sup> Johnson&O'Keeffe<sup>78</sup> and Nic Shuibhne<sup>79</sup> correctly point out, *Morson and Jhanjan* and *Uecker and Jacquet* illustrate that the primary beneficiary must not only be entitled to the right of free movement, but must have actually exercised it in order for Community law to come into play. This point was to be developed further in *Surinder Singh*.<sup>80</sup> The final remark that can be made based on these two cases is that EU citizenship, as instituted by the Treaty of Maastricht, does not create the previously lacking link between wholly internal situations and the application of Community law, as the Court explicitly stated in *Uecker and Jacquet*.<sup>81</sup>

*Surinder Singh*<sup>82</sup> sheds new light on the cross-border movement condition, and represents a turning point in the ECJ's treatment of a wholly internal rule in family reunification matters. The facts of the case have already been presented above. The British authorities argued that Mr. Singh's right to re-enter and reside in the UK derived from national law. The ECJ, however, held that the period of the British national's work in another Member State enabled her spouse to rely on Community law and claim the

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<sup>73</sup> Tillotson and Foster, TEXT, CASES AND MATERIALS ON EUROPEAN UNION LAW, Cavendish Publishing Limited, 2003, p. 342.

<sup>74</sup> Maduro, WE THE COURT, Hart Publishing, 1998, p. 154.

<sup>75</sup> N. Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, (2002) 39 CMLRev. p. 731.

<sup>76</sup> Weatherill and Beaumont, EU LAW, Penguin, 1999, p. 714.

<sup>77</sup> Cremona, see n. 7

<sup>78</sup> Johnson&O'Keeffe: *From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994*, (1994) 31 CMLRev. p. 1339.

<sup>79</sup> Shuibhne, see n.75, p. 736.

<sup>80</sup> *Singh* (n.9)

<sup>81</sup> *Ibid.*, para.23

<sup>82</sup> *Singh* (n.9)

rights stipulated under Community secondary legislation.<sup>83</sup> It based its judgement on the statement that “a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State”.<sup>84</sup> The Court further elaborated that deterrence would have been evident if the EC national’s “spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State”.<sup>85</sup> As Barrett notes, it is strange to argue that an individual will be deterred from going to another Member State because the conditions in that state are better than in the individual’s home state, but acknowledges possible deterrence from going back to one’s home state if one could not enjoy the same benefits, upon returning, as in the other Member State, which would obviously harm the exercise of one’s right to free movement within the common market.<sup>86</sup>

The Court’s decision in *Singh* is clearly important, since it limits the application of a wholly internal rule, consequently broadening the reach of Community law as well as extending, if not bending, interpretation of the cross-border movement rule. While Tillotson and Foster<sup>87</sup> refer to this case as an example of the “softening of the wholly internal rule”, Nic Shuibhne<sup>88</sup> suggests that *Singh* is the first case in the field of family reunification matters to leave “a door ajar” for Community law to come into play. The Court based its judgement on both Articles 39 (free movement of workers) and 43 (right of establishment) of the EC Treaty, due to the fact that Ms. Singh exercised her right of free movement as a worker while in Germany, within the meaning of Article 39 of the EC Treaty, and returned to the UK to establish herself as a self-employed person, within the meaning of Article 43 of the EC Treaty. Craig & de Burca<sup>89</sup> and Nic Shuibhne<sup>90</sup> point out the ambiguity regarding whether Community rights would have equally applied had Ms. Singh not been able to rely on Article 43 of the EC Treaty, i.e. had she not performed an economic activity as a self-employed person after re-entering the UK. The Court did not address this issue at all, but rather used both Articles 39 and 43 in its argumentation. Due to the fact that the Court’s judgement was based on a completely different argumentation, namely, on the satisfaction of the cross-border movement requirement, one could argue that the issue of the performance of an economic activity upon return to the host Member State was not important in this case, and that the decision would have been the same had Ms. Singh returned to the UK as a worker or even without performing any economic activity in the UK at all.

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<sup>83</sup> *Singh* (n.9), article 21 of the judgement. Cremona (Cremona, *Citizens of Third Countries: Movement and Employment of Migrant Workers within the European Union*, (1995) 2 Legal Issues of European Integration, p. 93.) points out that *Singh* demonstrates that, once a primary beneficiary has exercised the right of free movement, the right will apply even against his/her home state.

<sup>84</sup> *Singh* (n.9), para.19

<sup>85</sup> *Singh* (n.9), para.20

<sup>86</sup> Barrett, *Family Matters: European Community Law and Third-Country Family Members*, (2003) 40 CMLRev. p. 379.

<sup>87</sup> Tillotson and Foster, see n.73, p. 343.

<sup>88</sup> Shuibhne, see n.75 p. 744.

<sup>89</sup> Craig and de Burca, see n.32, p. 743.

<sup>90</sup> Shuibhne, see n.75, p. 745.

In any case, the decision in *Singh* introduced a rule whereby, in situations that might look purely internal at first glance, an EC national could trigger the application of Community law to his right to family reunification by means of a prior cross-border movement. The ruling in *Singh* created a way for EC nationals to invoke Community protection for their third-country national family members, by exercising their right to free movement to another Member State as workers and returning to their home state. Significantly, the facts in *Singh* suggested that the non-Community family member needed to take part in the cross-border movement, an interpretation that was to be dismissed by the later cases analysed below, leading to an even more drastic shrinking of the wholly internal rule.<sup>91</sup> The prior movement rule was invoked by the parties in these later cases before the ECJ, and it was reiterated by the Court and applied to similar situations.<sup>92</sup>

Before moving on to the next case, *Carpenter*,<sup>93</sup> which represents a further step in the narrowing of the wholly internal rule and the cross-border movement condition, one needs to consider its different legal basis compared to the previously analysed cases. *Carpenter* deals with the free movement of services (and not workers), and is therefore based on Article 49 of the EC Treaty and Community secondary legislation in this area. It will nevertheless be discussed in this chapter along with relevant cases on the free movement of workers, since it forms a substantive unity with other cases on family reunification of EC nationals.

In *Carpenter*, a third-country (Philippine) national claimed the right of residence in the UK with her British spouse on the grounds that he provided services in other Member States from time to time. Ms. Carpenter maintained that “since her husband’s business required him to travel around in other Member States providing and receiving services, he could do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband’s right to provide and receive services”.<sup>94</sup> The UK immigration authorities, on the other hand, held that Mr. Carpenter was entitled to be accompanied by his spouse when travelling to other Member States to provide services, but while he was resident in the UK he could not be considered to be exercising any freedom of movement within the meaning of Community law.<sup>95</sup> The UK argument was therefore based on the wholly internal rule, while Ms. Carpenter maintained her claim was encompassed by Community legislation on the free movement of services. The ECJ was faced with two questions. First, whether the spouse of an EC national who is established in one Member State and provides services in other Member States has the right to reside with him in the spouse’s Member State of origin. Second, whether the fact that the EC national’s spouse is performing childcare indirectly assists the EC national in providing services, and therefore changes the answer to the first question.<sup>96</sup> The Court first eliminated the application of Directive 73/148/EEC,<sup>97</sup> as the relevant Community legislation determining the right to free

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<sup>91</sup> *Carpenter* n.38

<sup>92</sup> *Carpenter* n.38; *Akrich* n.5

<sup>93</sup> *Carpenter* n.38

<sup>94</sup> *Ibid.*, para.17

<sup>95</sup> *Ibid.*, para. 18

<sup>96</sup> *Ibid.*, para.20

<sup>97</sup> Council Dir.73/148 [1973] OJ L 172/14 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to the establishment and

movement of EC national service providers and their family members. It correctly stated that the Directive governs the conditions under which an EC national service provider and his family members may leave that national's Member State and enter and reside in *another* Member State; it does not govern the right of residence of his family in his Member State of origin.<sup>98</sup> The Court then moved on to an analysis of the application of Article 49<sup>99</sup> of the EC Treaty to the facts of this case. It first established that "the separation of Mr. and Ms. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter exercises a fundamental freedom", and concluded by saying that "that freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse".<sup>100</sup> Ms. Carpenter's residence right, therefore, indirectly derived from the Treaty provision on the free movement of services.

The reasoning of the European Court of Justice in *Carpenter* raises several points for discussion. It does not simply follow the principle established in *Singh*, but rather moves it to a new level by accepting two crucial elements that distinguish the situation in *Carpenter* from that in *Singh*. The first is that *Carpenter* concerns the free movement of services, not workers. The second is that Ms. Carpenter, unlike Ms. Singh, did not travel with Mr. Carpenter to the other Member States where he provided services, but instead stayed in Mr. Carpenter's state of origin and took care of his children. These two distinguishing factors accumulatively shed new light on the cross-border movement rule (at least with regard to services) by adjusting it to a situation like that in *Carpenter*. The Court decided that Ms. Carpenter was entitled to reside in Mr. Carpenter's state of origin, and not in the other Member State where he provided services. This is why Directive 73/148/EEC could not be applied, and recourse was directly made to the Treaty provision. In this respect, it was crucial that Ms. Carpenter's activities (childcare) conditioned Mr. Carpenter's ability to travel to other Member States and provide services there, to the extent that precluding Ms. Carpenter's right would deter Mr. Carpenter from the exercise of his fundamental freedom.<sup>101</sup> Therefore, in a situation such as this, the cross-border movement condition is still effective, but there must also be a link between the activities performed by the non-Community family member and the effective exercise of the fundamental freedom to provide services by the EC national, to the extent that precluding the right to family reunification would constitute a *deterrence* to the exercise of the EC national's fundamental freedom.<sup>102</sup> This implies that if Mr. Carpenter had had no children for Ms. Carpenter to look after, the opposite judgement would have been made. In *Carpenter*, the Court again limited the scope of the wholly internal rule, and slightly modified the cross-border movement condition in cases where only an EC national moves, while his spouse's activity enables him to exercise his fundamental freedom.

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provisions of services.

<sup>98</sup> *Carpenter* (n.38), para.35,36

<sup>99</sup> Article 49(1) of the EC Treaty states that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended".

<sup>100</sup> *Carpenter* (n.38), para.39

<sup>101</sup> *Ibid.*

<sup>102</sup> Shuibhne (see n.75, p. 760) calls this "the notion of deterrence", meaning that the Court's decision hinges on the second question posed to the Court, i.e. whether the non-national spouse indirectly assists the EC national in providing services in other Member States by carrying out childcare.

It is questionable whether this new, softened cross-border movement rule would apply equally to cases of the free movement of workers and establishment. So far, Community secondary legislation in the area of the free movement of workers and cases before the ECJ have made it clear that family reunification rights apply only when a non-Community family member moves *together* with an EC national to another Member State. However, what would happen if Mr. Carpenter moved to another Member State as a worker, while his non-Community spouse stayed in his state of origin to take care of his children from his first marriage? Would the same logic then apply, leading Ms. Carpenter's right of residence to be indirectly derived from Article 39 of the EC Treaty stipulating the free movement of workers?<sup>103</sup> Similarly, would it apply to a case in which Mr. Carpenter was self-established in a Member State other than his state of origin, while Ms. Carpenter took care of his children in his home state? One could argue that the judgement in *Carpenter* could not be transferred to a situation in which Mr. Carpenter was a worker or a self-established person in another Member State. Unlike services, which are of a temporary character, work and establishment imply a link with another Member State on a continuous and more permanent basis, which could thus lead to the conclusion that Mr. Carpenter, being a worker or a self-established person, voluntarily caused harm to his family life by moving to another Member State on a permanent basis, while leaving his wife and children back home instead of taking them with him. On the other hand, one could think of a number of situations that would call this reasoning into question. For example, what if Mr. Carpenter travelled home every weekend, and had decided not to take his family with him to the other Member State so as not to interrupt his children's schooling? Would it then matter that work and establishment are of a different nature than services? And, most importantly, would the fact that Mr. Carpenter travelled to the other Member State as a worker or a self-established person nullify the detrimental effect that Ms. Carpenter's deportation would have on his exercise of a fundamental freedom? Essentially, no. Bearing this in mind, there are grounds for believing that the Court might reach the same conclusion in a situation where Mr. Carpenter moved to the other Member State as a worker or a self-established person. Whichever arguments we accept as valid, however, only future judgements by the ECJ will resolve the issues raised by *Carpenter*.

Further questions arise with the direct application of Treaty provisions (not secondary legislation) to cases of family reunification. Who can be the addressees of the right to family reunification in cases such as *Carpenter*, where Treaty provisions apply directly – are they the same or different than the category defined by the relevant secondary legislation?<sup>104</sup> As long as there is no direction provided by the ECJ's case-law to prove otherwise, it seems reasonable to presume that the addressees are the same as in the relevant secondary legislation.

Finally, some authors have, in this context, drawn attention to the more extensive nature of services, as compared to work and establishment.<sup>105</sup> While situations in which an EC national engages in an economic activity in another Member State, or provides services while being physically present there, seem to be more easily discernible and limited to a

<sup>103</sup> Again, the application of Community secondary legislation in the field of free movement of workers would have to be eliminated since, according to Article 10 of Council Reg. 1612/68 (n.3), it specifically applies to cases where the non-Community family member wants to install himself together with the EC national worker in the territory of a Member State *other than the latter's state of nationality*.

<sup>104</sup> Barrett, see n. 86, p. 407.

<sup>105</sup> Shuibhne, see n.75, p.758 ; Barrett, see n.86, p.407; Tillotson and Foster, see n.73, p.345



specific group of EC nationals, there are two other situations that must be taken into consideration. The first is where an EC national provides services in another Member State without any physical movement. Here it is the service itself that crosses the border, thus eliminating the wholly internal situation. Second, the Court long ago established that Article 49 also covers situations where the recipient of services travels to another Member State in order to receive services there. One can establish with certainty that such situations are numerous and, if family reunification rights for the service recipients are implied, they could cover almost all EC nationals. Tillotson and Foster wonder whether it is necessary for rights to fall under the heading of engaging in an economic activity in order to trigger the application of Community law and eliminate wholly internal situations.<sup>106</sup> The test of engagement in an economic activity might be a good way to draw a line between situations (in the area of the free movement of services) that fall within a wholly internal situation and those that invoke the family reunification rights of EC nationals under Community law. If not, then simply receiving services would trigger the application of Community law and guarantee residence rights to family members, overruling national laws.

To conclude, looking generally at the family reunification cases presented above, the Court's wording in *Carpenter*,<sup>107</sup> *Nani Givane*,<sup>108</sup> and *MRAX*<sup>109</sup> suggests that the protection of the family life of EC nationals recognised by Community legislation in this area is still viewed within the context of the free movement principle. Thus, in *Carpenter*<sup>110</sup> the Court stated that "...it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member State in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community". The Court took into consideration Article 8 of the European Convention for the Protection of Human Rights, guaranteeing the right to respect for family life, but the overall judgement placed the right to respect for family life in the context of an interpretation of the free movement of services stipulated by Article 49 of the EC Treaty.<sup>111</sup> *Akrich*,<sup>112</sup> the most recent judgement in this area, significantly changed this approach.

In *Akrich*<sup>113</sup> the Court hinged application of the cross-border movement rule on another condition. A non-Community national would be entitled to the Community rights provided for in Regulation 1612/68 on the freedom of movement of workers within the Community, only if he/she had, before moving to another Member State with an EC national, resided lawfully on the territory of the first Member State to which he/she was returning. The facts of the case are as follows: Mr. Akrich, a Moroccan citizen, was residing unlawfully in the UK when he married a British citizen in June 1996 and applied for leave to remain in the UK as her spouse. At the beginning of 1997 Mr.

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<sup>106</sup> Tillotson and Foster, see n. 73, p. 345.

<sup>107</sup> *Carpenter* n.38

<sup>108</sup> *Nani Givane* (n. 58) para.45

<sup>109</sup> Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. État belge* [2002] ECR I-6591, para.53

<sup>110</sup> *Carpenter* (n.38), para.38

<sup>111</sup> *Ibid.*, para. 41-46

<sup>112</sup> *Akrich*, n.5

<sup>113</sup> *Ibid.*

Akrich was detained under the British Immigration Act and later, in accordance with his wishes, deported to Dublin, where his spouse had previously established herself. At the beginning of 1998, Mr. Akrich applied for a revocation of his deportation order and entry clearance as the spouse of a person settled in the UK. Ms. Akrich was offered employment in the UK commencing in August 1998. When interviewed by the British authorities in Dublin, Ms. Akrich said that her husband was applying for entry clearance based on the decision in *Singh*. The Immigration Appeal Tribunal referred the matter to the ECJ for a preliminary ruling. The Court basically had to decide whether Mr. Akrich could be granted entry to the UK and, if so, on what grounds, taking into consideration the fact that he was initially residing there unlawfully, and that the couple had moved to another Member State with the intention of returning to the UK by claiming the benefit of Community law.

In its ruling, the ECJ first stated that, in order to be able to benefit from the rights provided for in Article 10 of Regulation 1612/68, “a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated”.<sup>114</sup> It then continued by stating that Article 10 of Regulation 1612/68 applies only where the marriage is genuine, and that the intention of the spouses when installing themselves in another Member State is not relevant to the assessment of their legal situation.<sup>115</sup> Finally and most significantly, the Court concluded by stating that in a situation where Article 10 of Regulation 1612/68 does not apply due to unlawful residence in the Member State’s territory, the competent authorities of that Member State “must nonetheless have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>116</sup>

One thing is evident from this case: once a non-Community national has resided illegally in one Member State, cross-border movement cannot change his/her residence status from illegal to legal. Consequently, illegal residence status precludes the application of Community law on free movement (both the Treaty provisions and secondary legislation) to this case. However, Mr. Akrich seems to be entitled to stay in the Member State on a completely different legal basis – the right to family life under Article 8 of the ECHR. Judging by the formulation used by the Court (“*must have regard*” to the right to respect for family life under Article 8 of the ECHR), there is no set obligation for the national court to base its judgement on Article 8 of the ECHR. The ECJ is simply pointing the national court in the right direction by obliging it to take Article 8 of the ECHR *into consideration*. Despite such a formulation, which only obliges the national court to *have regard* to Article 8 of the ECHR, but not to actually *apply* it, this judgement carries a great deal of weight. It hardly seems imaginable that a national court would not actually apply the right to respect for family life and, consequently, deny Mr. Akrich the right to enter the UK. What, then, is the legal basis of the judgement in *Akrich*? Does it rely on Article 8 of the ECHR, as another legal system outside its jurisdiction, or on something else? The right to respect for family life is one of the fundamental rights guaranteed by the ECHR, and these in turn constitute

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<sup>114</sup> *Akrich*, (n.5),para.61, first indent

<sup>115</sup> *Akrich*, (n.5),para.61, second and third indent

<sup>116</sup> *Akrich*, (n.5),para. 61, fourth indent

the general principles of EC law.<sup>117</sup> In this context, one can assert that the ECJ has taken the general principles of EC law as its legal basis in *Akrich*.

The judgement in *Akrich* is revolutionary, since it obliges a national court to take the right to family life into consideration, at the same time acknowledging the fact that Community law on free movement does not apply at all. Can we, therefore, assume that cross-border movement is of no relevance to the Court's decision in *Akrich*, or is it still a requirement despite the non-reliance on Community provisions on free movement? Would the judgement have been the same if Mr. and Ms. Akrich had not travelled to another Member State at all, but had remained in Ms. Akrich's state of origin? If so, one could deduce that *Akrich* has indirectly abandoned the wholly internal situation rule to the benefit of fundamental rights. Even though the Court in *Akrich* does not say anything explicitly, it seems to suggest that cross-border movement is still a requirement, no longer for the application of Community legislation on free movement, but instead for the general principles of EC law. Cross-border movement can be seen as a key element giving the ECJ jurisdiction to rule in this case. One could conclude that fundamental rights have still not entirely replaced the cross-border movement condition in *Akrich*. On the contrary, the two seem to complement each other. Will future ECJ case-law go further in this direction, replacing the cross-border movement condition entirely with fundamental rights? The trend we have witnessed so far definitely suggests this. In any case, recent judgements show that the internal situation rule leading to reverse discrimination is slowly softening, and even vanishing. *Akrich* could be seen as the culminating point of this trend.

Finally, one could draw a parallel between the notion of the right to respect for family life, as a fundamental right that provides a safe haven for family members of EC nationals not encompassed by Community law on free movement, and the notion of citizenship as the umbrella category for all EC nationals' rights. However, two points need to be made here. First, as mentioned previously, EU citizenship does not resolve the paradox of purely internal situations,<sup>118</sup> and so far (according to the situation in *Akrich*) it seems that the right to respect for family life as a fundamental right does not, either. Second, despite the possible parallel between the two notions, citizenship can easily be perceived as a dividing line strictly separating EC nationals from third-country nationals. It seems difficult to prevent EU citizenship from becoming a means of excluding third-country nationals from living in the Union. In this light, association agreements, such as the Europe Agreements and Stabilisation and Association Agreements, and the policy of family reunification can be viewed as system of bridging this divide, but only in the narrow group of situations prescribed therein.

### 3. Beneficiaries

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<sup>117</sup> Article 6(2) of the EU Treaty stipulates that the Union shall respect fundamental rights, as guaranteed by the ECHR and derived from the constitutional traditions common to the Member States, as the general principles of Community law.

<sup>118</sup> Cases C-64 & 65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet* [1997] ECR I-3171, paragraph 23: "citizenship of the Union, established by Article 8 of the EC Treaty, is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law".

Before identifying which family members are beneficiaries of the rights to family reunification granted under EC secondary legislation, it is necessary to define the term “beneficiaries” and understand to whom it refers. As already explained above, the derivative nature of the rights of family members of EC nationals creates two lines of beneficiaries of such rights, depending on the angle from which these rights are viewed. On the one hand, there are the EC nationals from whom their family members’ rights derive (primary beneficiaries). There is nothing derivative about primary beneficiaries’ rights to free movement and family life. Primary beneficiaries are those whose right to family life is protected under law, and would be violated by deterring a family member from residing with them. On the other hand, the rights of family members do not exist in and of themselves, and so they can be regarded as indirect beneficiaries of the primary beneficiaries’ rights to free movement and family life (secondary beneficiaries). The rights arising from family reunification apply regardless of the nationality of the secondary beneficiary; he/she can be any third-country national. This chapter will mostly deal with secondary beneficiaries. However, since the rights of secondary beneficiaries would not exist without the rights of primary beneficiaries, it is first necessary to identify possible primary beneficiaries. In the case of a non-Community national related to an EC national, the primary beneficiary can be an EC national who is a worker,<sup>119</sup> a provider or recipient of services, a self-established person,<sup>120</sup> a retired person,<sup>121</sup> a student,<sup>122</sup> or a person enjoying rights under Community law with sufficient resources to avoid becoming a burden on the social assistance system.<sup>123</sup>

The rights of family members of EC national workers are stipulated by Regulation 1612/68/EEC on freedom of movement for workers within the Community, which is based on Article 49 of the EC Treaty. Article 10 of Regulation 1612/68 lists the secondary beneficiaries of an EC worker’s right to family reunification. Article 10(1) states that “the following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse”. Further on, Article 10(2) of Regulation 1612/68 states that “Member States shall *facilitate* the admission of any member of the family not coming within the provision of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes” (emphasis added).

Here again, the term “spouse” refers only to married partners of EC nationals. Such a narrow interpretation of the term “spouse”, which excludes any stable relationship

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<sup>119</sup> See Articles 39 to 42 of the EC Treaty on freedom of movement of workers; Council Regulation 1612/68 (n.3) on freedom of movement for workers within the Community; Council Dir. 68/360 [1968] OJ L 257/13 on the abolition of restrictions on movement and residence within the Community for workers from Member States and their families.

<sup>120</sup> See Articles 43 to 48 on establishment; Articles 49 to 55 on services; Council Dir. 73/148 [1973] OJ L 172/14 on the abolition of restrictions on Member States with regard to establishment and the provision of services.

<sup>121</sup> See Council Directive 90/365 (n.3) on the right of residence for employees and self-employed persons who have ceased their occupational activity; Article 39(3)(d) of the EC Treaty on the right of workers who have been employed in another Member State to remain in the territory of that Member State upon retirement; Commission Regulation 1251/70 (n.53) on the right of workers to remain in the territory of a Member State after having been employed in that State.

<sup>122</sup> See Council Dir. 93/96 [1993] OJ L 317/59 on the right of residence for students.

<sup>123</sup> See Council Dir. 90/364 (n.3) on the right of residence.

outside civil marriage, was supported by the European Court of Justice in *Reed*.<sup>124</sup> The case concerned a denial of the right of residence in the Netherlands to Ms. Reed, the unmarried partner of a British national employed there. Ms. Reed came to the Netherlands to join her long-term partner and registered for employment, but did not succeed in finding a job, and so remained unemployed. In responding to the question of whether Article 10(1) of Regulation 1612/68 must be interpreted to mean that a person who has a stable relationship with a worker is to be treated as his “spouse” for the purposes of that provision, the Court decided in the negative.<sup>125</sup> The Court elaborated that the term “spouse” must be held to refer to a marital relationship only, due to “the absence of any indication of a *general social development* which would justify a broad construction, and in the absence of any indication to the contrary in the regulation” (emphasis added).<sup>126</sup> The phrase “general social development” in the wording above suggests that interpretation must take into consideration the situation in the whole Community, and not just one Member State.<sup>127</sup> However, there are grounds for believing that, by the same wording, the Court has left open the possibility of broadening the legal definition of the term “spouse” should social changes across the Community so require.

The judgement in *Diatta*, analysed above, shows that the term “spouse” also refers to married partners not living under the same roof.<sup>128</sup> Furthermore, both *Diatta*<sup>129</sup> and *Surinder Singh*<sup>130</sup> suggest that the term “spouse” does not include former spouses, i.e. spouses whose marriage has been finally dissolved. Additionally, *Surinder Singh* reveals that a “sham” marriage will not cause either spouse to fall within the meaning of Article 10 of Regulation 1612/68.<sup>131</sup>

As cited above, apart from referring to the primary beneficiary’s spouse, Article 10(1) of Regulation 1612/68 also encompasses “their descendants who are under the age of 21 years or are dependants and dependent relatives in the ascending line of the worker and his spouse”. The term “descendants” covers all children, adopted children and grandchildren of either the primary beneficiary or his spouse, i.e. the secondary beneficiary. Such an interpretation protects the children of third-country nationals married to EC nationals, neither of whose parents is a Community national. In *Baumbast* the Court rightly stated that a more restrictive interpretation of this provision, which would grant rights only to children common to the migrant worker and his spouse, “would run counter to the aim of Regulation 1612/68”.<sup>132</sup> Similar to “descendants”, the term “relatives” refers to all relatives in the ascending line of the primary and secondary beneficiary, not only their parents.<sup>133</sup> Finally, the Court defined the concept of “dependency” in *Lebon*.<sup>134</sup> Here the ECJ stated that “both Article 10(1) and 10(2) of Regulation 1612/68 must be interpreted as meaning that the status of dependent members of a worker’s family is the result of a factual situation”, and continued by explaining that “the person having that status is a member of the family

<sup>124</sup> Case 59/85, *Netherlands v. Reed* [1986] ECR 1283.

<sup>125</sup> *Reed* (n.124), para.16

<sup>126</sup> *Reed* (n.124), para.15

<sup>127</sup> Martin and Guild, *FREE MOVEMENT OF PERSONS IN THE EU*, Butterworths, 1996, p. 143.

<sup>128</sup> *Diatta* (n.8) para. 10

<sup>129</sup> *Diatta* (n.8) para. 20

<sup>130</sup> *Singh* (n.9) para.12

<sup>131</sup> *Ibid.*

<sup>132</sup> *Baumbast and R* (n.10) para.57

<sup>133</sup> Martin and Guild, see n. 127

<sup>134</sup> Case 316/85, *Centre Public d’Aide Sociale de Courcelles v. Lebon* [1987] ECR 2811.

who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up paid employment".<sup>135</sup>

The list of family members of other categories of EC nationals benefiting from the right to family reunification is identical or similar to the list of secondary beneficiaries of EC national workers stipulated by Regulation 1612/68. For example, the secondary beneficiaries of an EC worker who has been entitled to remain in the territory of a Member State after having been employed in that State are defined by Article 1 of Regulation 1251/70.<sup>136</sup> The family members benefiting from family reunification in such a case are identical to those named in Regulation 1612/68.<sup>137</sup> Also, the list of secondary beneficiaries of employees and self-employed persons who have ceased their occupational activity and wish to reside in a Member State in which they have never worked is given in Article 1(2) of Directive 90/365.<sup>138</sup> This list of secondary beneficiaries is slightly more restrictive than the one provided in Regulation 1612/68, insofar as descendants benefit from the right to family reunification only if they are dependents, irrespective of their age.<sup>139</sup> Another directive from 1990, Directive 90/364, defines the rights of secondary beneficiaries of EC nationals who enjoy the right of residence in another Member State by having resources sufficient to avoid becoming a burden on the social assistance system.<sup>140</sup> Here the wording of the provision pertaining to secondary beneficiaries is identical to Directive 90/365 and is thus, again, a bit more restrictive than Regulation 1612/68.<sup>141</sup>

Family members of EC nationals who are self-employed or providers of services entitled to the right to family reunification are defined by Article 1(c) and 1(d) of Directive 73/148.<sup>142</sup> The list here is similar to that defined by Regulation 1612/68. The only difference between the two is that Directive 73/148 limits family reunification rights to "*children* under 21 years of age" (emphasis added), while Regulation 1612/68 provides for family reunification rights for "*descendants* who are under the age of 21" (emphasis added).<sup>143</sup> However, this difference is not a substantial one, since Article 1(d)

<sup>135</sup> *Lebon* (n. 134) para.22

<sup>136</sup> Commission Regulation 1251/70 (n.53) on the right of workers to remain in the territory of a Member State after having been employed in that State.

<sup>137</sup> Article 1 of Regulation 1251/70 (n.53) states: "The provisions of this Regulation shall apply to nationals of a Member State who have worked as employed persons in the territory of another Member State and to members of their families, as defined in Article 10 of Council Regulation 1612/68 on freedom of movement for workers within the Community".

<sup>138</sup> Council Directive 90/365 (n.3) on the right of residence of employees and self-employed persons who have ceased their occupational activity.

<sup>139</sup> Article 1(2) of Directive 90/365 (n.3) grants the right of residence to the following family members of the primary beneficiary: "(a) his or her spouse and their descendants who are dependants; (b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse".

<sup>140</sup> Council Directive 90/364 (n.3) on the right of residence.

<sup>141</sup> Article 1(2) of Directive 90/364 grants the right of residence to the following family members of the primary beneficiary: "(a) his or her spouse and their descendants who are dependants; (b) dependent relatives in the ascending line of the holder of the right of residence and his or her spouse".

<sup>142</sup> Council Directive 73/148 (n.120) on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

<sup>143</sup> Articles 1(c) and 1(d) of Directive 73/148 list the following secondary beneficiaries: Article 1(c) of Directive 73/148 states: "the spouse and the children under 21 years of age of such nationals, irrespective of their nationality; while Article 1(d) states: "the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality".

of Regulation 73/148 covers descendants who are dependents. Thus the only category of secondary beneficiaries covered by Regulation 1612/68 and excluded by Regulation 73/148 are descendants who are neither children of the primary beneficiary or his spouse, nor dependants (e.g. grandchildren under the age of 21 who are not dependents). One can therefore conclude that the group of family members benefiting from family reunification rights is a bit narrower in the case of EC nationals who are self-employed persons and providers of services than in the case of those who are workers. Finally, the list of secondary beneficiaries of an EC national student's right to family reunification is the most restrictive, compared to that for workers, self-employed persons, providers of services, retirees and EC nationals entitled to the right of residence in another Member State by virtue of sufficient resources. The list of secondary beneficiaries of EC students has been narrowed down to a "student's spouse and their dependent children".<sup>144</sup> One could argue that such a restriction is justified on the grounds that a student's period of residence in a Member State is time-limited and, therefore, that the right of residence should be extended only to absolutely necessary, i.e. nuclear family members.<sup>145</sup> However, the fact remains that the Community has chosen to adopt a very strict approach in this case, in contrast to its much broader approach regarding other categories of EC nationals.

To conclude, the list of secondary beneficiaries of the right to family reunification is most extensive in the case of EC workers and EC nationals entitled to remain in the territory of a Member State after having been employed there. The Community has adopted a slightly more restrictive approach in the case of family members of EC nationals who are self-employed persons, providers of services or persons not engaged in economic activities and covered by Directives 90/365 and 90/364. The least extensive approach has been chosen in the case of students' family members. Generally speaking, the Community has once again recognised the free movement of workers and other EC nationals as one of its priorities, one which could not succeed without extension of these rights to their family members.

#### **4. Scope of Rights**

The rights of family members of EC nationals derive from EC secondary legislation, i.e. from a number of directives and regulations which provide for a very broad spectrum of rights. Regulation 1612/68 on the freedom of movement of workers within the Community enables EC national workers to circulate freely from one Member State to another. Such freedom of movement would not be complete without enabling workers to bring their closest family members with them, and without conferring certain rights on those family members so as to facilitate their integration in the host Member State. This aim is acknowledged in the preamble of Regulation 1612/68, which states that "freedom of movement constitutes a fundamental right of workers and their *families*" (emphasis added), and that "...obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his *family* and the conditions for the integration of that family into the host country" (emphasis added). These statements confirm the derivative nature of the rights granted to secondary beneficiaries.

The first right granted to family members of EC migrant workers by Article 10(1) of Regulation 1612/68 is the right to "install themselves with the worker". This right

<sup>144</sup> Article 1 of Council Directive 93/96 (n.122) on the right of residence for students.

<sup>145</sup> Martin and Guild, see n. 127, p. 209.

consists of the right to enter and reside in the host Member State. The Regulation, however, imposes an additional condition: namely, the worker must have housing for his family such as is considered normal for workers according to the standards of the region where he is employed.<sup>146</sup> Family members of other categories of EC migrants, such as retirees, self-employed persons, service providers, persons with sufficient resources, or students, are also granted entry and residence rights in the host Member State. According to Regulation 1251/70, family members of workers who have acquired the right to remain in the territory of a Member State after having been employed there are likewise granted the right to remain, and can continue to do so even after the worker's death.<sup>147</sup> Family members can also, under certain conditions, acquire the right to remain in a case where the worker has died during his working life before having himself acquired the right to remain.<sup>148</sup> Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity and Directive 90/364 on the right of residence of EC migrants who have sufficient resources to avoid becoming a burden on the social assistance system also grant the family members of such persons the right to remain in the territory of the host Member State. Similarly, the right of residence is also granted to family members of EC nationals who establish themselves in another Member State in order to pursue self-employed activities or to provide services (Directive 73/148). Finally, Directive 93/96 grants the right of residence to family members of student migrants who are EC nationals.

The second right granted by Regulation 1612/68 to an EC worker's spouse and children under the age of 21 or dependent on him is the right to take up employment activities throughout the territory of the host Member State.<sup>149</sup> It remains unclear why this provision focuses exclusively on the right to employment, without mentioning self-employed activities. Some authors suggest that this provision nevertheless entails an implicit right to self-employment, whose refusal would otherwise lead to a breach of the equal treatment principle contained in Article 7(2)<sup>150</sup> of Regulation 1612/68.<sup>151</sup> Significantly, the three directives on the right of residence for economically inactive EC migrants contain a similar provision, but without this restriction. The spouse and dependent children of an employee or self-employed person who has ceased his occupational activity, of an EC migrant who has sufficient resources to avoid becoming a burden on the social assistance system, and of an EC national student migrant are explicitly granted the right to take up both employed and self-employed activities anywhere within the territory of the host Member State.<sup>152</sup>

Article 12 of Regulation 1612/68 grants the children of an EC national migrant worker the right to be admitted to the host Member State's general education, apprenticeship and vocational training system under the same conditions as nationals of the host Member State. Finally, family members of EC workers benefit from Article 7(2) of

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<sup>146</sup> Article 10(3) of Regulation 1612/68 (n.3)

<sup>147</sup> Article 3(1) of Regulation 1251/70 (n.53)

<sup>148</sup> Article 3(2) of Regulation 1251/70.

<sup>149</sup> Article 11 of Regulation 1612/68.

<sup>150</sup> Article 7(2) of Regulation 1612/68 stipulates that the worker "shall enjoy the same social and tax advantages as national workers".

<sup>151</sup> Martin and Guild, see n.145, p. 146.

<sup>152</sup> Article 2(2) of Directive 90/365 (n.3) on the right of residence for employees and self-employed persons who have ceased their occupational activity; Article 2(2) of Directive 90/364(n.3) on the right of residence; Article 2(2) of Directive 93/96 (n.122) on the right of residence.



Regulation 1612/68, stipulating that a worker who is a national of one Member State enjoys the same social and tax advantages in the territory of another Member State as workers who are nationals of that State. Such a principle of equal treatment with regard to social advantages has been extended to family members of EC national migrant workers by the European Court of Justice. In *Lebon*, the Court stated that a broad interpretation of the equal treatment provision, which also encompasses the worker's family members, "contributes to the integration of migrant workers in the working environment of the host country in accordance with the objectives of the free movement of workers".<sup>153</sup> However, the Court then continued by specifying that the worker's family members qualify only indirectly for the equal treatment accorded to a worker by Article 7(2) of Regulation 1612/68, and only if such benefits may be regarded as social advantages for the worker himself within the meaning of the provision.<sup>154</sup> In *Deak*, a case concerning a Hungarian national living in Belgium with his Italian mother – a migrant worker – and claiming Belgian unemployment benefits, the ECJ clarified that the equal treatment principle laid down in Article 7(2) of Regulation 1612/68 indirectly applies to family members regardless of their nationality.<sup>155</sup> Significantly, the right to social advantages also applies to family members of workers entitled to remain in the territory of a Member State after having been employed there (Article 7 of Regulation 1251/70), but not to other categories of EC migrants and their family members.

## 5. Conclusion

The foregoing discussion has offered a detailed analysis of current developments in the area of family reunification, and offered answers to a number of issues raised by existing Community legislation and case-law in this area. Three general observations may be made based on the analysis above.

First, Community legislation and case-law on family reunification for EC nationals is clearly moving away from the perception of family reunification as an economic right, based on the free movement principle and the internal market objective, towards a conception of it as a social right and, ultimately, a fundamental right to respect for family life, one which is applicable not only to EC nationals, as the primary beneficiaries, but also to their family members as secondary beneficiaries. The more this process develops, the further away it moves from its original objective related to the internal market and free movement, and comes closer to an acceptance of family members as individuals *per se*. The current approach is only one step away from abandoning the cross-border movement requirement, thereby entirely letting go of free movement as the legal basis for family members' rights. This trend is occurring hand in hand with the process of extending the levels of European integration and creating a "multi-faceted Union".

Second, a number of cases decided by the European Court of Justice in the area of family reunification for EC nationals reveal the prominent role the Court has been playing in the protection and expansion of family members' rights.<sup>156</sup> The Court has

<sup>153</sup> *Lebon* (n.134) para.11

<sup>154</sup> *Lebon* (n.134) para.12

<sup>155</sup> Case 94/84, *Office national de l'emploi v Jozsef Deak* [1985] ECR 1873, paragraph 26.

<sup>156</sup> On the other hand, cases such as Case C-243/91, *Belgian State v. Taghavi* [1992] ECR I-4401, Case 316/85, *Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811 and Case

given a broad interpretation to a number of provisions dealing with family reunification, such as Article 10 of Regulation 1612/68, specifying that this provision does not require a family member to live under the same roof as the primary beneficiary,<sup>157</sup> and Article 12 of Regulation 1612/68, stating that the educational rights granted to primary beneficiary's children comprise the right of the parent who is their primary carer to reside with them.<sup>158</sup> The Court's reasoning in *Carpenter*<sup>159</sup> and *Akrich*,<sup>160</sup> on the other hand, suggests that it has taken the pulse of the Community and is moving from the economic into the social and human dimension of the free movement principle, with the ultimate goal (not yet completely reached) of approaching family reunification entirely outside the free movement principle, and instead within the framework of fundamental human rights.

Third, Community legislative activity in the area of family reunification for EC nationals has a number of flaws, and can be considered partly outdated with regard to the present moment of European integration, such as in the case of Regulation 1612/68, which excludes unmarried partners as family members eligible for family reunification<sup>161</sup> (apart from a situation in which *Reed* could apply). Most importantly, all current Community legislation on family reunification for EC nationals is part of the legislation on free movement. It therefore places family reunification rights exclusively within the context of the free movement principle and the cross-border movement requirement. Considering the general trend in this area, which is distancing itself from the free movement principle and a strict interpretation of what constitutes a purely internal situation, one could generally conclude that the basic premises on which Community legislation dealing with family reunification for EC nationals is founded may be considered inappropriate and outdated at the present moment of European history.

Bearing in mind the present status of family reunification in the EU, what future trends could one expect in the short and medium term? Two important developments need to be considered here in order to reach any general conclusion. The first is the adoption of Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. The second document which is of crucial importance for the overall process of European integration is the EU Constitution adopted at the Brussels European Council on 17 and 18 June 2004.

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C-356/98, *Kaba v. Secretary of State for the Home Department* [2000] ECR I-2623 illustrate the Court's readiness to impose limitations on the interpretation Article 7(2) of Regulation 1612/68, which deals with equality in social advantages, in certain cases where this article is used to grant rights to migrant workers' family members.

<sup>157</sup> *Diatla*, see n.8

<sup>158</sup> *Baumbast and R*, see n.10

<sup>159</sup> *Carpenter*, see n.38

<sup>160</sup> *Akrich*, see n.5

<sup>161</sup> The same exclusion of unmarried partners is valid for other legislative acts dealing with EC migrants, such as Regulation 1251/70, Directive 73/148, Directive 90/365, Directive 90/364 and Directive 93/96. On the other hand, the Family Reunification Directive leaves it to Member States' national law to decide whether unmarried partners are to be granted the same rights as primary beneficiaries' spouses.

As its title clearly states, Directive 2004/58 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, will, as of 30 April 2006, replace Articles 10 and 11 of Regulation 1612/68 and Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96.<sup>162</sup> The new Directive 2004/58 entered into force on 29 April 2004, and must be transposed into Member States' national legal systems by 30 April 2006. It resulted primarily from the need for a single instrument that would simplify and streamline previously existing arrangements in the field of free movement and residence rights for EU citizens and their family members.<sup>163</sup> It takes into consideration "the new legal and political environment established by the citizenship of the Union" and relies on EU citizenship as the legal basis for the right to free movement and residence of EC nationals and their family members.<sup>164</sup> Despite this, the Directive does not eliminate the cross-border movement requirement necessary in order to avoid internal situations, since it only covers situations where an EC national moves to reside in another Member State. It can therefore be deduced that Directive 2004/58 follows the reasoning of the European Court of Justice in *Uecker and Jacquet*, where it stated that citizenship of the Union is not intended to extend the scope *ratione materiae* of the Treaty to internal situations which have no connection with Community law.<sup>165</sup>

The two most important substantive contributions made by Directive 2004/58 are entailed in Articles 2(2)(b) and 13. Article 2(2)(b) stipulates that the term "family member" also encompasses partners "with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State".<sup>166</sup> This provision is a step forward from the judgement in *Reed*, which ruled out the possibility of interpreting the term "spouse" in Article 10(1) of Regulation 1612/68 so as to include partners in a stable relationship.<sup>167</sup> However, the innovation introduced by Article 2(2)(b) of Directive 2004/58 can be viewed as a follow-up to the Court's explanation of its judgement in *Reed*, which suggested that there was room for broadening the definition of the term "spouse" in the case of a general social change across the Community.<sup>168</sup> In this line of thought, Article 2(2)(b) is a product of the Community's legislative recognition of such a social development.<sup>169</sup>

<sup>162</sup> Article 38(1) and 38(2) of Commission Dir. 2004/58 [2004] OJ L 120/26

<sup>163</sup> Indent 3 and 4 of the Preamble to Directive 2004/58. See also Title 1.4 of the Explanatory Memorandum of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001)257 final).

<sup>164</sup> Indent 1 and 2 of the Preamble to Directive 2004/58 (n.162)

<sup>165</sup> Cases C-64 & 65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet* [1997] ECR I-3171, para.23

<sup>166</sup> See also Indent 5 of the Preamble to Directive 2004/58.

<sup>167</sup> *Reed* (n.124) para.16

<sup>168</sup> *Ibid.*, para.15

<sup>169</sup> Commentary of Article 2(2) of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001)257 final) states: "The 'family group' has been recently undergoing rapid change and more and more people, often with children, are forming 'de facto' couples. Furthermore, several Member States have introduced a special status, with a set of rights and obligations, which cohabiting unmarried couples can register for. In the context of the right of residence, Community law cannot ignore this development, so the proposal is to treat unmarried partners as equivalent to spouses for residence purposes, where the legislation of the host Member State provides for unmarried partner status and on the terms of any such legislation."

The second, and probably most important, contribution of Directive 2004/58 to the protection and extension of family reunification rights is Article 13, on the retention of the right of residence by family members in the event of divorce, annulment of marriage, or termination of registered partnership. This provision rules out the possibility of revoking the right of residence in a host Member State for secondary beneficiaries whose relation with the primary beneficiary has been terminated by divorce, annulment of marriage, or termination of registered partnership.<sup>170</sup> Therefore, it provides a solution in cases where the break-up of a family relation between a primary and secondary beneficiary could harm a third-country national's fundamental rights. This means that the situation suggested by the Court in *Diatta* and *Singh*, where a third-country national would face possible expulsion from the host Member State once divorce proceedings were finalised, will, by transposition of the Directive into Member States' national legal systems, no longer be possible. This is a remarkable improvement from the Court's reasoning in *Diatta*<sup>171</sup> and *Singh*,<sup>172</sup> and shows the importance of legislative action in cases where no initiative has been given by the Court. This safeguard, whose sole purpose is to protect the secondary beneficiary's fundamental rights and human dignity, is in line with Weiler's reasoning cited above.<sup>173</sup>

It can be concluded that Directive 2004/58 offers some noteworthy contributions, feeling the pulse of social change in the Community as suggested by the European Court of Justice, for example, with regard to legislative protection of EC nationals' registered partners, and extending protection for family members in new situations not previously handled by the Court, such as divorce, annulment of marriage, or termination of registered partnership. Despite these improvements and the unification of a number of legal acts into a single instrument, Directive 2004/58 still remains rooted in the free movement principle, and will therefore maintain the prominent role of the European Court of Justice in cases like *Akrich*,<sup>174</sup> which concern the extension of family reunification rights to situations further removed from a free movement legal basis.

The second important development that has possibly affected progress in family reunification rights in the Community is the adoption of the Treaty establishing a Constitution for Europe at the Brussels European Council on 17 and 18 June 2004. In the context of family reunification for EC nationals, the crucial part of the Constitution is its Part II, incorporating the Charter of Fundamental Human Rights of the Union and rendering it a legally binding text with constitutional status.<sup>175</sup> Two articles are of importance here. First, Article II-7, entitled "Respect for private and family life", which stipulates that "everyone has the right to respect for his or her private and family life, home and communications". This Article is almost identical to Article 8(1) of the

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<sup>170</sup> Article 13 of Directive 2004/58 (n.162). See also Indent 15 of the Preamble to Directive 2004/58 and Title 2.4 of the Explanatory Memorandum of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001)257 final).

<sup>171</sup> *Diatta*, see n. 8

<sup>172</sup> *Singh*, see n.9

<sup>173</sup> Weiler, see n. 33

<sup>174</sup> *Akrich*, see n.5

<sup>175</sup> Article 7(1) of Part I, Title II (Fundamental Rights and Citizenship of the Union) of the Constitution proclaims that "The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution".

European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>176</sup> and, consequently, must be interpreted in the same way or, alternatively, more extensively.<sup>177</sup> A more restrictive interpretation than the one given in the relevant Convention article is prohibited. Second, Article II-33, entitled “Family and professional life”, states in its first paragraph that “the family shall enjoy legal, economic and social protection”.

In this context, two questions have to be taken into consideration. First, will the legally binding nature of Articles II-7 and II-33 of the Constitution change the nature and level of protection for family reunification rights? Will the cross-border movement rule and purely internal situations still be possible in family reunification cases once the Charter becomes a legally binding document? Second, will the prospect of the Union’s future accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the actual act of accession affect the approach taken by the European Court of Justice when judging family reunification cases by extending the rights conferred on family members?<sup>178</sup>

As to the first question, it has already been concluded that the Court would have had no jurisdiction in both *Carpenter* and *Akrich* had a cross-border movement not taken place. This requirement is seen in its finest, most subtle form in *Akrich*, where cross-border movement was still a requirement, yet no longer for the application of free movement legislation, but rather for the general principles of EC law. Will this change when the EU Constitution comes into force and the Charter becomes legally binding? It seems reasonable to believe that there will not be any change in this direction. Article II-51(1) of the Draft Constitutional Treaty stipulates that “the provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*” (emphasis added). It further elaborates in Article II-51(2) that “[t]his Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”. This article implies that the Charter, despite its future status as a legally binding document, cannot apply to purely internal situations, since such situations do not allow for the application of Union law. In a situation like *Akrich*, this would mean that the Charter would not enable the ECJ to rely on its provisions protecting family life in cases where no cross-border movement has taken place. Thus, according to the wording of the future legally-binding Constitutional Treaty, Mr. Akrich could not be granted the right to stay in the host Member State without his wife’s having exercised the right to free movement. The Constitutional

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<sup>176</sup> Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that “everyone has the right to respect for his private and family life, his home and his correspondence”. Unlike Article II-7 of the Constitution, the Convention elaborates the right to respect for family life in its Article 8(2): “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>177</sup> Article II-52(3) states that “insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

<sup>178</sup> Article 7(2) of the Constitution declares that “the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

Treaty does not put an end to purely internal situations in family reunification cases, nor does it provide greater rights than those already granted.

The second question, i.e. the effect on the ECJ's approach towards family reunification cases of the Union's future accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, must be viewed in the context of the overall relationship between the European Court of Justice and the European Court for Human Rights that is to be created upon future accession. Following accession, the ECJ will remain the supreme judicial authority for interpretation of questions regarding Union law, thus including the Charter.<sup>179</sup> The European Court for Human Rights will, however, have external control over issues resulting from the Union's obligations arising from accession to the Convention, but only after all remedies within the EU system have been exhausted.<sup>180</sup> The changing constellation between the two courts in dealing with human rights issues following the Union's accession to the Convention might lead to the ECJ's more careful observance of the Strasbourg court's position in matters such as the protection of family life. Such a development could provide additional incentives to the ECJ's general tendency of shifting from a free movement to a fundamental rights position in family reunification cases.

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<sup>179</sup> Final report of the European Convention Working Group II, "Incorporation of the Charter/Accession to the ECHR" (CONV 354/02), 22 October 2002, p. 12.

<sup>180</sup> Article 35(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.